RAJA HUMAID RAJA IZZET

v.

CHAU KAN YU & ANOR.

HIGH COURT MALAYA, MALACCA
WAN YAHYA J
[CIVIL SUIT NO. 83 OF 1981]
1 FEBRUARY 1989

LAND LAW: *Failure of plaintiff to redeem land in 12 years - Section 16 Limitation Act 1953 read in the light of s. 9 Limitation Act 1953 - Mortgagee in possession - Bona fide purchaser for value - Procedure to discharge mortgage - Section 279 National Land Code - Notice under s. 279(1)(b) National Land Code - Section 314 National Land Code - Cancellation and endorsement of mortgage - Trespass - Position of successors of deceased mortgagor where letters of representation not taken out.*

Haji Abdul Hai bin Haji Abas (the registered proprietor of land held under Geran Mukim (MCL) No. GM 171 for Lot No. 167) had mortgaged the land to Chan Sum Mui to secure the repayment of the principal sum of RM300 and interests *vide* the mortgage. Chan Sum Mui who was also appointed as the lawful attorney for the registered proprietor had custody of the title deeds and had since obtained proprietary rights.

After the death of Chan Sum Mui no action was taken by Chan's personal representatives to recover the mortgage or to recover the said loan. The defendants are the lawful sons of Chan Sum Mui but are not the executors or administrators of the Estate of Chan Sum Mui.

Since the death of Chan Sum Mui the defendants have had the custody of the title deeds and have been in possession and occupation of the land for more than 50 years. The defendants have personal knowledge of the circumstances leading to and subsequent to the execution of the Power of Attorney. The defendants have been enjoying the profits from the said land and have been paying all the rents due thereon.

Without the knowledge of the defendants, Tahir Bin Hj Abdul Hai paid a sum of RM690 to the collector of land revenue to discharge the mortgage. Subsequently on 31 January 1980 the collector of land revenue cancelled the memorandum of registration of the mortgage. Upon the death of the registered proprietor the land was transferred to his 4 children. On 24 March 1980 these 4 children sold and transferred the land to Nor Hakim Bin Jaafar allegedly free from all encumbrances. On 11 April 1980 Nor Hakim bin Jaafar sold and transferred the land to the plaintiff allegedly free from all encumbrances. The plaintiff is now the registered proprietor of the land.

The plaintiff through their solicitors had notified the defendants to quit and vacate the said land.

The issues now between the parties are:

(1) whether the plaintiff can legally maintain an action.

(2) whether the mortgage together with the power of attorney in the circumstances is still valid.

(3) whether the defendants have unregistered proprietary rights.

(4) whether in the absence of letters of representation, the defendants as the desendants of a deceased mortgagor, are entitled to lawful occupation of the said land.

(5) whether the plaintiff is a trustee in equity and therefore accountable to the defendants for the sums due under the said mortgage.

Held:

[1] The plaintiff is not a person registered as a proprietor of the land by virtue of the National Land Code (Penang and Malacca Titles) Act 1963 or the National Land Code 1965.

[2] The mortgagor's right to redeem his land in the present case is barred by s. 16 of the Limitation Act.

[3] The right of the mortgagee to occupy the land as a mortgagee in possession remains.

[4] Without the letters of representation from the deceased Chan Sum Mui the defendants had only an equitable interest in the land.

[5] The mortgage had not been lawfully discharged.

[Plaintiff's claim dismissed and each party to bear his own costs.]

Case referred to:
Ho Sim Pat v. Chang Ah Ngi & Anor. [1987] CLJ (Rep) 646

Legislation referred to:
Limitation Act 1953, ss. 9(2), 11(2), 16
National Land Code (Penang and Malacca Titles) Act 1963, ss. 102(2), 104, 279(1)(b), 314

For the plaintiff - Krishnan; M/s. Mohd Ali & Co.
For the defendants - De Cruz; M/s. Tay Leong Siak & Co.

JUDGMENT

Wan Yahya J:

The facts of this case as agreed in the statement of issues filed read as follows:

Agreed statement of issues in dispute for trial without pleadings pursuant to order of the Honourable Mr. Justice Wan Yahya bin Pawan Teh, dated 20 March 1986.

1. The following facts are agreed between the plaintiff and the defendants and admitted for the purpose of this action:

(1) Since 1920 Haji Abdul Hai bin Haji Abas was the registered proprietor of land held under Geran Mukim (MCL) No. GM 171 for Lot No. 167 in the Mukim of Balai Panjang, Melaka, in the state of Melaka (hereinafter referred to as the "said land")

(2) On 30 May 1929 the said Haji Abdul Hai bin Haji Abas mortgaged the said land to Chan Sum Mui to secure the repayment of the principal sum of RM300 and interests *vide* Mortgage No. 122 of 1929.

(3) By the said Mortgage No. 122/29, the said Haji Abdul Hai bin Hj. Abas appointed the said Chan Sum Mui as his lawful attorney for performing certain acts and things.

(4) The said Chan Sum Mui had custody of the title deed and obtained proprietary right since.

(5) The said Chan Sum Mui after her death did not subsequently by her personal representatives amongst other things take any action to enforce the said mortgage or recover the said loan to date.

(6) The said Chan Sum Mui died on or about 9 March 1946.

(7) The defendants are the lawful sons of the said Chan Sum Mui.

(8) The defendants are not the administrators or executors of the Estate of Chan Sum Mui, deceased.

(9) Before and after the death of the said Chan Sum Mui, the defendants have been in possession of the said land and since her death had custody of the title deed of the said land.

(10) the defendants have been staying upon the said land for more than 50 years and personally known the circumstances leading to and subsequent to the execution of the said Power of Attorney.

(11) The defendants have been enjoying the profits from the said land and have been paying all the rents due thereon.

(12) On 24 November 1979 a sum of RM690 was paid to the Collector of Land Revenue, Melaka, in discharge of the said mortgage pursuant to s. 279 of the National Land Code by Tahir bin Hj. Abdul Hai without the knowledge of the defendants.

(13) On 31 January 1980 the Collector of Land Revenue, Melaka, cancelled the memorial of registration of the said mortgage pursuant to s. 314 of the National Land Code.

(14) The said Haji Abdul Hai bin Haji Abas died.

(15) Upon the death of the said Haji Abdul Hai bin Haji Abas, the said land was transferred to his children:

(1) Abbas bin Hj. Abdul Hai, (2) Siti Bte. Hj. Abdul Hai, (3) Tahir bin Hj. Abdul Hai and (4) Abdul Rahman bin Hj. Abdul Hai.

(16) On 24 March 1980 the said (1) Abbas bin Hj. Abdul Hai, (2) Siti Bte. Hj. Abdul Hai, (3) Tahir bin Hj. Abdul Hai and (4) Abdul Rahman bin Hj. Abdul Hai sold and transferred the land to Nor Hakim bin Jaafar *vide* Presentation No. 900/80, Jil. No. 128 Folio No. 28 allegedly free from all encumbrances.

(17) On 11 April 1980, the said Nor Hakim bin Jaafar sold and transferred the said land to the plaintiff *vide* Presentation No. 1105/80 Jilid No. 129 Folio 39 again allegedly free from all encumbrances and the plaintiff is the present registered proprietor of the said land.

(18) The plaintiff's then solicitors, Messrs. Morris Edgar & Clough Thuraisingham, wrote to the defendants letter dated 17 March 1981 requesting the defendants to quit and vacate the said land.

(19) The defendants received the said letter dated 17 March 1981.

(20) The defendants did not vacate the said land as requested by the plaintiff and are still occupying the said land.

(21) There is no relationship of landlord and tenant or privity of contract as between the plaintiff and the defendants. The defendants never paid the plaintiff any rent or other consideration for using or occupying the said land.

(22) A reasonable amount for the use and occupation of the said land is the sum of RM per mensem.

2. The defendants will contend as follows:

(1) That the alleged transfers of the land to any third parties are illegal.

(2) That the defendants are lawfully entitled to occupy the said land in consequence of *inter alia* the said registered mortgage coupled with a Power of attorney executed by the late owner Haji Abdul Hai bin Hj. Abas, in favour of the defendants' mother, Chan Sum Mui and or as the unregistered properties thereof.

(3) That the defendants are in lawful occupation of the said land as the defendants have custody of the title deed in consequence of *inter alia* the power of attorney in favour of their mother, Chan Sum Mui.

(4) That the defendants are not trespassers or trespassers by relation.

(5) That the plaintiff is a trustee in equity of all those sums of money due to the Estate of Chan Sum Mui under the said mortgage.

3. The plaintiff will contend as follows:

(1) That the defendants are not entitled to the benefit of the said mortgages as it was discharged by payment and/or barred by limitation of time, and/or as the defendants are not the personal representatives of Chan Sum Mui, deceased.

(2) That the defendants are not entitled to the said land as the Power of attorney was revoked on the death of Chan Sum Mui and/or on the discharge of the mortgage.

(3) That the defendants, not being the personal representatives of Chan Sum Mui, deceased, are not entitled to a declaration that the plaintiff is a trustee in equity or liable for all sums due to the Estate of Chan Sum Mui under the said mortgage.

(4) That since the defendants are not in lawful occupation of the said land and are trespassers.

4. By reasons of the aforesaid agreed facts and contentions, the issues between the parties are as follows:

(1) Whether the plaintiff can legally maintain this action.

(2) Whether or whether not the plaintiff can contend that the said mortgage *inter alia* coupled with the Power of Attorney in the circumstances is still valid or invalid or whether the defendants have unregistered proprietary rights.

(3) Whether or whether not the plaintiff can contend that in the absence of any letters or representation, the defendants as descendants of a deceased mortgagor, are entitled to lawful occupation of the said land.

(4) Whether the plaintiff is or is not a trustee in equity and is or is not accountable to the defendants for the sums due under the said mortgage.

5. The plaintiff claims:

(a) Vacant possession of the said piece of land.

(b) An injunction to restrain the defendants whether by themselves or their servants or agents or otherwise whosoever from entering on to the plaintiff's said land and remaining in possession thereof.

(c) Damages or alternatively loss of rental at the rate of RM350 per month from 11 April 1980 to date of vacant possession delivered.

(d) Interest thereon at the rate of 8% per annum from date hereon to the date of realisation.

(e) Costs.

(f) Further or other relief.
Dated this 7 July 1986.

Sgd. Mohd. Ali & Co.

Solicitors for the plaintiff.

The issues arising from those facts and raised in the plaintiff's written submission are

(i) Whether plaintiff can legally maintain the action.

(ii) Whether the mortgage is valid.

(iii) Whether the defendants as descendants of the mortgagee are entitled to lawful occupation.

(iv) Whether the plaintiff is a trustee in equity.

My decision on similar issues as raised in both (i) and (ii) and (iii) above appeared in *Ho Sim Pat v. Chang Ah Ngi & Anor.*, [1987] CLJ (Rep) 646 at p. 651 as follows:

> Another point of law raised in objection against this application is based on the limitation of redemption action on the plaintiff for failure to redeem the land within 12 years period (as specified in s. 16 of the Limitation Act) from the Mortgagee who was, at all times, a mortgagee in possession. The plaintiff's Counsel's argument against this is s. 16 of the Limitation Act 1953 (Act 254) will not apply to this land as it fell under the exemption spelt out in sub-section (2) of s. 9 of the same Act. Now ss. 9 and 16 read as follows:
>
> 9.(1) No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him, or if it first accrued to some person through whom he claims, to that person.
>
> (2) Nothing in this section or in s. 11(2) of this Act shall be deemed to affect the provisions of the Government Proceedings Ordinance 1956, or the National Land Code (Penang and Malacca Titles) Act 1963, or to apply:
>
> (a) to the ruler of any state, in respect of state land or land reserved for a public purpose situated in such state;
>
> or
>
> (b) to any person registered under or by virtue of the provisions of the National Land Code (Penang and Malacca Titles) Act 1963, as the proprietor of the land sought to be recovered, or to any person claiming through a person so registered, except to the extent that such Code or Act so provides or permits.
>
> 16. When a mortgagee of land has been in possession of any of the mortgaged land for a period of twelve years, no action to redeem the land of which the mortgagee has been so in possession shall thereafter be brought by the mortgagor or any person claiming through him:
>
> Provided that where a mortgagee is by virtue of mortgage in possession of any mortgaged land and either receives any sum in respect of the principal or interest of the mortgage debt or acknowledges in accordance with the provisions of s. 27 of this Act the title of the mortgagor or his equity of redemption, an action to redeem the land in his possession may be brought at any time before the expiration of twelve years from the date of the payment or acknowledgment.

My understanding of s. 9(2) is that, limitation period will not apply to the National Land Code (Penang and Malacca Titles) Act 1963 or to a proprietor registered under the same Act. The right claimed by the defendants is not based on the Act but on a mortgage registered under the Malacca Lands Customary Rights Ordinance (Cap. 125) and similarly with reference to s. 2(b), neither is the plaintiff herein a person registered as a proprietor of the land by virtue of the Act or the National Land Code. As indicated earlier, this land as well as other 6,000 still remain as EMR land until such time as the collector has had the opportunity of processing it under s. 102(2) of the Act.

On the other hand, s. 16 makes express mention of 'mortgage', and 'mortgagor' and not 'charge' or 'chargor' as used in the act and the code. This I think reflects the clear intention of the legislature to make s. 16 of the Limitation Act inapplicable to pre-existing interest of a mortgagee in possession.

Likewise I would hold that the mortgagor's right to redeem his land in the present case is barred by s. 16 of the Limitation Act whilst the right of the mortgagee to occupy the land as a mortgagee in possession remains until such time as and when he succeeds in an application under s. 104 of the National Land Code (Penang and Malacca Titles) Act 1963 or when some other actions under the same act are taken.

In arriving at this decision I have also considered the following:

The plaintiff is not a *bona fide* purchaser for value. In the plaintiff's own words "At the time of purchase I was informed land office held an enquiry. I was told this money has to be paid to redeem this property ..." and further on during cross-examination the plaintiff said:

> I saw the land from the roadside only. When I saw the property I saw the two families on the land. I did not find out from them what right they had on the land. Yes my notice on A5 dated 17 March 1981. When I bought it, it was agricultural land but I wanted to convert it to building so when I decided to develop the land into building I gave the notice.

It seems to me that the plaintiff was aware of the subsisting mortgage in respect of which the redemption money "would have to be paid" and yet he only viewed the land to be purchased from the roadside, and in spite of his knowledge of the existence of two families on the land he completely shut his eyes to the surrounding circumstances and went on to buy the land at a price which appeared to be well below the market price. It is in evidence that the plaintiff paid RM84,000. It is also common knowledge that for the purpose of a charge the bank would assess the land up to 80% of its actual value. The market value of the land therefore could have been in the region of RM120,000 and yet the plaintiff only paid RM84,000 for it.

The manner of the transaction is yet another matter of suspect. The land was first allegedly purchased for the children of the mortgagor by the plaintiff's brother-in-law for RM80,000. Nor Hakim the brother-in-law initially claimed he paid RM20,000 ready cash in hand when he was only a clerk with a salary of RM600 per month. Subsequently he changed the figure into RM8,000. Nevertheless RM8,000 cash is a surprisingly large sum for a RM600 p.m. clerk to hold. He first told the Court that he had bought it with a view to selling it to his brother-in-law but when he was asked whether he had discussed this proposed sale with his brother-in-law (plaintiff) he altered his evidence to say that he had orginally intended to develop it himself but later decided to sell it to his brother-in-law. I find it hard to believe that as a meagre salaried clerk with no previous experience on housing development, he could have the confidence and resources to raise the first payment and embark upon such a heavy financial commitment. Anyway according to him after the down payment of RM8,000 his brother-in-law (plaintiff) came to his rescue by paying the balance of RM72,000. I find the figure given by this witness's (PW2) evidence to be in contradiction to that of the plaintiff who said he had paid RM84,000 in all for the land and not RM80,000 as claimed by PW2.

Another unbelievable account of this purported sale transaction is also given by PW2. In this evidence he said that he bought the land from a person he could not remember. He did not inspect the land and was not sure of its exact location. He denied knowledge of the presence of the defendant or the mortgage and the subsequent enquiry although his brother-in-law (PW1), had stated in evidence earlier that he learnt about the mortgage and enquiry from the brother-in-law (PW2).

The mode of purchasing the land is likewise most unconvincing to me. I am unable to accept any sales between a stranger (whose name he said he could not remember) could be conducted by an absolute transfer of names between the parties on the mere consideration of 1/10th of its purchase value.

To my mind this repeated sale and purchase agreement is nothing more than an attempt to clothe the plaintiff with the false appearance of a *bona fide* purchaser for value thereby defeating the right of the mortgagor and his successor from taking further action.

Another contention of the plaintiff is that the mortgage had been discharged by an enquiry held by the Collector of Land Revenue on 24 November 1979. However it would appear that the procedure under s. 279 of the National Land Code had not been complied with. The collector went on to hear the enquiry although the provision of s. 279(1)(b) i.e., the applicant's inability to trace the person to receive the money on the chargee's behalf had not been made out. PW3 the collector who produced these notes (P2) was unable to say why an interest was calculated at 29% for 5 years instead of the 12% per annum as provided in the mortgage for the duration up to 1979. A handwritten note signed by an unidentified person (A4) was tendered in an attempt to prove that the money had been paid but PW3 denied that this forms part of the records of proceedings. In which event I would reject the authenticity of the evidence and hold that notice as required by s. 279(1)(b) and the payment of redemption money had not been paid and subsequently on cancellation and endorsement as required by s. 314 of the National Land Code was affected. Under the circumstances and until s. 314 is complied with I find that the mortgage has not been lawfully discharged.

The plaintiff had also raised the question of the right of the defendants to defend when no letter of administration had been taken out. I would only at this stage observe that the suit was based on the allegation of trespass and as such the defendants have the right to defend and in so doing they have a right to raise the question of their interest be it equitable in nature at this stage. I do not consider it fair to deny them of this defence especially so when it was the plaintiff who had elected to sue them personally.

Since the defendants have not taken the letter of administration in respect of their father, the mortgagor in possession, they only had an equitable interest in the land. Be it so the issues raised in their statement of defence is nevertheless available to them and it is for the plaintiff to show the Court that the mortgage no longer subsists. Some distinction must be drawn between the right of a person to sue and to defend. In any event as I have held earlier that the plaintiff is barred from taking action under the Limitation Act and the mortgage has not been lawfully discharged. I do not propose to go into further discussions on this point.

The plaintiff's claim is hereby dismissed. Each party to bear his own costs.

Also found at [1990] 2 CLJ 89